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Case No. _____

IN THE

Supreme Court of the United States

October Term, 1983

EDWARD SACK

Petitioner.

v.

KIMBERLY-CLARK CORPORATION

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED JUNE 9, 1983)

July 28, 1983

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Senior Judge

EDWARD SACK,)
Plaintiff-Appellant,)
No. 82-3088 vs.)
KIMBERLY-CLARK CORPORATION,)
Defendant-Appellee.)

Appeal from the United
States District Court
for the Northern [sic]
District of Wisconsin.
No. 81-728
Terence T. Evans, Judge.

ORDER

The plaintiff sued the defendant on June 22, 1981, alleging that the defendant fired him in violation of the Age Discrimin-

ation in Employment Act, 29 U.S.C. §§ 621-634 (1967). In addition, the plaintiff asserted state law claims, alleging that the defendant made false representations during his hiring process. The district court granted summary judgment for the defendant on the age discrimination claim, and dismissed the state claims. Because there are no genuine issues of material fact requiring a trial, and because the plaintiff failed to establish a prima facie case of age discrimination, we affirm.

I

The plaintiff was hired at age forty-seven as an employee benefits attorney for the defendant. He was fired one year later. Deposition testimony reveals that the plaintiff's supervisors from time to time thought the plaintiff's work and work habits were inadequate and that the plaintiff was fired expressly because his work performance was

unsatisfactory. (Block dep. 148, 172-73, 176-82, 243, 245-56, 251-53, 329; Tormey dep. 88-89, 123-28; Sack dep. 173-76, 232-34.)

The district court concluded under two analyses that summary judgment was appropriate. First, the court determined that when all of the plaintiff's allegations of facts were accepted as true the evidence showed that the plaintiff "was not qualified in the company's eye for the job for which he was hired. Therefore, [the plaintiff] failed to make out a prima facie case of age discrimination." (R. 30(5).) In addition, the district court reasoned that "the company . . . articulated a non-discriminatory reason for his termination," that is, unsatisfactory work performance. (R. 30(5).) The district court noted that the plaintiff had "failed entirely" to show that the defendant's reasons for the dismissal were pretextual. (R. 30(6).)

II

We believe that the district court properly analyzed the record before it. There were no genuine issues of material fact. Moreover, the plaintiff did not establish a prima facie case of discrimination. For example, the plaintiff argues that he proved his qualifications for the job principally by showing that his work was accepted by the defendant without criticism. (Appellant's br. at 12.) Yet, unrebutted deposition testimony reveals several instances when the plaintiff's superiors thought that he was doing poor work. In addition, the only evidence offered to show that the defendant's professed reason for the firing was pretextual--that there was a pattern in the office of age discrimination--in fact showed no pattern of discrimination at all. (R. 29(6-10); R. 30(6).) The district court, relying in part on this circuit's

decision in Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981), concluded that the plaintiff did not show that age was a determining factor in his discharge. We agree.

Only three points in this appeal merit our attention. First, the plaintiff argues that a "competent" rating he received from his superiors six months before he was fired establishes a prima facie case of discrimination, citing Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975). But Laugesen dealt only with whether a dispute of fact at trial shifted the burden to the defendant to prove non-discrimination. The document in Laugesen which the plaintiff claims is analogous to his "competent" rating was a separation notice form which, among other things, rated the plaintiff "good." Here, even accepting the plaintiff's interpreta-

tion of the "competent" rating--an interpretation sharply disputed by the defendant--does not raise a triable issue, for, in the period between the "competent" rating and his termination, the plaintiff was not performing adequately, according to unrebutted deposition testimony.

Second, the plaintiff argues that the United States Supreme Court's decision in United Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478 (1983), requires us to reverse because it has changed the requirements for establishing a prima facie case of discrimination. We do not believe that Aikens requires reversal here. Aikens does not change the McDonnell Douglas-Burdine standards for establishing a prima facie case of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Rather, the

Court in Aikens clarifies the requirements of proof at trial after a defendant has failed to persuade the district court to dismiss the action for lack of a prima facie case. See Aikens, 103 S. Ct. at 1482; id. at 1483 (Blackmun, J., concurring).

Third, the plaintiff argues that the district court abused its discretion in dismissing the pendent state claims which the plaintiff pressed against the defendant, because one or more of the claims will be time barred from state adjudication. We do not believe that the district court abused its discretion. See Wis. Stat. Ann. § 893.15(3) (1980); see also Shafer v. Wegner, 78 Wis.2d 127, 135, 254 N.W.2d 193, 197 (1977).

III

The district court's judgment granting the defendant's motion for summary judgment and dismissing the complaint is affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

EDWARD SACK,

Plaintiff,

v.

Civil Action
No. 81-C-728

KIMBERLY-CLARK CORPORATION,

Defendant.

DECISION and ORDER

This action, brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, et seq., is before me on the defendant's motion for summary judgment.

The plaintiff Edward Sack was hired as an "Employee Benefits Attorney" by the defendant Kimberly-Clark Corporation on July 23, 1979. At that time Sack was 47 years old. Sack was hired by Barry S. Block, the Director of Kimberly-Clark's Employee Benefits Administration Department. On July 8, 1980, less than a year after he was hired,

Sack was terminated by Block. This action arises out of the termination.

Before he came to Kimberly-Clark, Sack worked as an attorney at the Paul Revere Life Insurance Company. He resigned that position effective November 30, 1978. He actively pursued employment after his resignation but did not accept another job until he went to Kimberly-Clark in July of 1979.

Sack was told during the interviewing process with Kimberly-Clark that the company was looking for an experienced Employee Benefits Attorney to allow the company to reduce its use of outside counsel. The attorney then working for Kimberly-Clark, Mr. Douglas Tormey, who continued to work with Sack, apparently did not have sufficient expertise in the field to allow the company to reduce its use of outside counsel.

Soon after starting work for Kimberly-Clark, Sack felt that he was not being used

to his full potential. He did not replace outside counsel and he felt there were projects which he could have been helping with but which he was not allowed to work on. Within six months from the time he began employment with the company he felt that his job was in jeopardy. In the spring of 1980, at the direction of Block, Sack ceased reporting directly to Block and began reporting to Tormey. Then on July 8, 1980, Block informed Sack that he was being terminated.

Following the termination Sack filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC). He furnished a detailed memorandum to the agency describing what he considered to be the facts supporting his claim of age discrimination. He was issued a notice of right-to-sue and he filed this federal court action on June 22, 1981.

Defendant argues that summary judgment should be granted because plaintiff has failed to make out a prima facie case of age discrimination. Alternatively defendant argues that even if plaintiff has made out a prima facie case of discrimination, there is no showing that Kimberly-Clark's stated justification for the dismissal was pretextual. Finally, defendant argues that if summary judgment is entered on the age discrimination claim, Sack's pendent state claims should be dismissed.

Summary judgment in discrimination cases, which often involve issues of intent, must be approached with caution. However, some cases are appropriate for summary disposition. In Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1218 (7th Cir. 1980), the court stated:

> "Summary judgment is improper in a discrimination case -- or any other -- if it

> involves -- as it often must -- any weighing of conflicting indications of motive and intent. Here plaintiff had no indications of motive and intent, supportive of his position, to put on the scales for weighing. It was a wholly empty case. In such circumstances, summary judgment is proper."

Like Kephart, this case is appropriate for summary disposition.

In order to meet his burden in establishing an age discrimination claim, Sack must show that age was a determining factor in his discharge. Kephart, supra.

The analysis of an age discrimination claim follows generally the pattern used in Title 7 cases as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The plaintiff has the initial burden of establishing a prima facie case of discrimination. He must show that he belongs to the protected class, that he was qualified for the position, that, as in the situation

before me, he was terminated, and that the employer attempted to replace him. Kephart emphasizes that the requirement that a plaintiff be qualified for the position is a changing requirement. That is, a plaintiff could be qualified under one set of circumstances but if the circumstances change in any way he may no longer be considered qualified. Kephart also emphasizes that within limits, it is the employer who determines whether an individual is qualified.

Once a plaintiff has made out a prima facie case, a defendant must articulate a non-discriminatory reason for the termination. A defendant, however, never has the ultimate burden of proof which, at all times, remains with the plaintiff. Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981). After an employer articulates a justification for an adverse employee action, the employee must prove that the justification

was merely a pretext -- that "but for" his age, he would not have been terminated.

Under this analysis, this case could be approached in two ways. Defendant here contends that Sack was terminated because he was not doing his job satisfactorily. On the one hand, under Kephart that would seem to indicate that Sack was not qualified for the job and therefore had not made out a prima facie case of discrimination. On the other hand, the fact that Sack was not, as Kimberly-Clark contends, doing his job satisfactorily can also be viewed as an articulation of a non-discriminatory reason for Sack's termination. I believe in this case, given the short time which Sack was employed by the company, Sack has failed to make out a prima facie case of discrimination.

The plaintiff in Kephart failed to make a prima facie case even though he possessed

on paper what would seem to be the qualifications necessary for the job and even though the company must have once thought him qualified because it hired him:

> "Presumably Mr. Kephart's degrees in economics do not ipso facto qualify him, nor does the fact that IGT once hired him." Kephart, at 1219.

Kephart was not qualified because:

> "... his work was not satisfactory to his employers for reasons articulated by them, related to his capabilities, and unrelated to his age."

Similarly, Sack's possession of a law degree and the fact that Kimberly-Clark hired him do not insure that he is qualified. In fact, he is not qualified for the job because his supervisors were disappointed in his capabilities and in the quality of his work.

Barry S. Block stated that he was unsatisfied with Sack's work. He stated

that Sack spent much of his time staring out the window, reading the Wall Street Journal, or socializing with other employees. Block Dep., February 24, 25 and March 25, 1982, p. 245. Block also stated that Sack required too much supervision; that there were many errors in his work; and that he had a poor writing style. Block Dep., pp. 252-253. By January, 1980, Block had very little faith in Sack's work and felt that he had to recheck everything that Sack did. Block Dep. p. 148. Consequently, Block changed the supervision structure of the department so that Sack reported to Tormey rather than to Block, to give Sack "every chance of doing a satisfactory job." Block Dep., p. 172.

Tormey, however, was also not happy with Sack's work. He also felt that he had to recheck everything. He stated that Sack was not thorough in the research he did. Tormey Dep., April 7, 1982, pp. 88, 89.

Tormey agreed with Block that Sack should be terminated.

Sack himself acknowledges that Block told him that he did not like his writing style and that his work was sloppy and careless. Block Dep., February 23 and 24, 1982, pp. 174, 175. Sack states that he never received praise or statements of approval from anyone at Kimberly-Clark. Sack Dep., p. 232.

On the basis of this record, I find that Sack was not qualified in the company's eyes for the job for which he was hired. Therefore, he has failed to make out a prima facie case of age discrimination.

Even were the case viewed from the other angle, that is if I were to say that Sack was qualified for the job and that he had therefore established a prima facie case, the company has, in my judgment, articulated a non-discriminatory reason for his termina-

tion. As the court stated in Kephart, at 1219:

> "Of course, unsatisfactory performance is the best of reasons [for termination], and the district judge construed this to mean unsatisfactory as evaluated by the employer, a decision, if not a mere pretext, not to be second-guessed by the court."

The dissatisfactions set forth above can also be seen as a non-discriminatory business reason for the termination.

Sack has failed entirely to show that the reasons are pretextual. He argues that the evidence shows a pattern of behavior in the treatment of older employees in Block's department of the company. The undisputed facts do not support the contention. Barbara Jones, Payroll Manager, age 45, resigned voluntarily and was replaced by Eugene Bahlman, age 52. Ken Boulay, age 47, was transferred to another position and was replaced by another employee of the company,

Mark Vander Zanden, age 39. Vander Zanden got the position because Block's supervisor wanted Vander Zanden's previous position for someone else. Donald Marshall, age 49, was transferred back to a position he had previously held for which he had more suitable skills. Howard Wainscott, age 66, retired. I cannot find that these employee transfers show any pattern, let alone an unlawful one.

Sack does not seriously contend that any statements made by company officials show that they discriminated against people on the basis of age. Block mentioned age only twice in conversations with Sack. Sack acknowledges that the import of these conversations is "less direct." Brief filed July 27, 1982, p. 17. One of the conversations was to the effect that Sack's pension would vest before he had put in ten years of service. This reference is too vague to show anything at all, especially since no

context for the statement is given. The second conversation was to the effect that Sack was a 45-year-old kid. Sack argues that this shows that Block disapproved of him because of his age. A much more rational explanation is that Block's disapproval of Sack was related to his behavior rather than his age -- that is, he was not acting mature.

The evidence in the record points to one of two conclusions. Either the company was genuinely unhappy with the quality of Sack's work or Sack's supervisor, Barry Block, was unable to work with Sack because of some sort of personality conflict. Sack acknowledges that the latter may have been the case: "I may have been hostile to him and I think he was hostile to me." Sack Dep., February 23, 24, 1982, p. 232. However, nothing in the record indicates that age was a determining factor in Sack's termination.

Therefore, the defendant's motion for

summary judgment on that issue is granted. Because the federal claim has been dismissed, Counts 2 and 3 of Sack's complaint which set forth pendent state claims are also dismissed. United Mineworkers v. Gibb, 383 U.S. 715 (1966).

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed.

Dated at Milwaukee, Wisconsin, this 23 day of November, 1982.

BY THE COURT:

/s/ Terence Evans
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE